Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-251

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GRADY P. MORRISON,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

CASES	Page
Anderson v. City of Bessemer City; ___ U.S. ___, 105 S.Ct. 1504 (1985)	2
D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, (1972)	1
United States v. Whitney, 602 F. Supp. 722 (W.D.N.Y. 1985)	2

Petitioner respectfully requests the Court to allow him to point out several shortcomings in the arguments put forward by Federal Deposit Insurance Corporation in opposition to the petition for writ of certiorari.

First and foremost FDIC deliberately avoids discussing the "deficiency judgment" aspect of the "due process" problem, that is, unless at page 6 of its brief by quoting from *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972), FDIC means to argue that all due process rights can be waived by contract, including the right of a potential deficiency judgment debtor to notice of a foreclosure sale so that his is afforded some "say so" as to the amount bid at the sale which will automatically and finally establish the amount of his deficiency. FDIC treats its foreclosure in this case as if it had never sought a deficiency judgment against Morrison. If it had been willing to take the property alone in satisfaction of the debt, there would be no controversy.

The next thing which FDIC overlooks, seemingly deliberately, is the fact known to the East Gadsden Bank, and thus constructively known by FDIC, that petitioner, Morrison, and the primary obligor, Long, never shared the same residence address. If East Gadsden Bank had ever asked petitioner for his address petitioner would gladly have furnished it. The fact is that the promissory note itself indicated the address of the property securing the note, and if that address had been used in a mailing notice to petitioner, petitioner would have received the notice. FDIC seeks to insulate itself from any obligation to be reasonable by an invocation of sympathy over the fact that it took over the assets of a failed bank.

Does this excuse it from the requirement of reasonableness? If this is an excuse then every transferee of every mortgage will have the same excuse for foreclosing without a bona fide attempt to give actual notice to the potential deficiency obligor.

It is, to say the least, interesting that, at page 7 of its brief, FDIC seeks to distinguish itself rom the ordinary mortgagee while at the same time claiming at page 6 that its power of sale was exercised in compliance with the contract traditionally contained in Alabama mortgages.

When FDIC argues at page 7 that "the FDIC's efforts to provide petitioner with notice plainly comported with due process standards", it is suggesting that the appellate court should overrule the trial court's finding of fact of fact at 568 F. Supp. 1242 that "FDIC made no reasonably diligent efforts to ascertain Morrison's correct address". *Anderson v. City of Bessermer City*; ___ U.S. ___, 105 S. Ct. 1504 (1985) reiterates the proposition that an appellate court may not substitute its judgment for the trial court on a factual issue resolved on the basis of substantial evidence. Because "due process" requires "reasonableness", FDIC is forced to argue that what it did or failed to do was "reasonable". The trial court found that what it did was not reasonable.

Lastly, FDIC maintains that there is no conflict between the circuits because *United States v. Whitney*, 602 F. Supp. 722 (W.D.N.Y. 1985), is a district court decision. FDIC blithely overlooks the fact that in *Whitney* the United States itself took an appeal to the Second Circuit and then dismissed its appeal. Perhaps anticipating Morrison's petition for certiorari, the United States did not want the Second Circuit to

have an opportunity to agree of record with Judge Telesca.

CONCLUSION

For the foregoing reasons and those appearing in the original brief, the petition for writ of certiorari should be granted.

Respectfully submitted,

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